

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**A.M., Appellant**

**and**

**DEPARTMENT OF HOMELAND SECURITY,  
U.S. CUSTOMS & BORDER PROTECTION,  
Olmito, TX, Employer**

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**Docket No. 20-1041  
Issued: December 7, 2020**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 17, 2020 appellant filed a timely appeal from a March 4, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant has met his burden of proof to establish ratable hearing loss for schedule award purposes.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the March 4, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **FACTUAL HISTORY**

On October 15, 2019 appellant, then a 42-year-old border patrol agent, filed an occupational disease claim (Form CA-2) alleging that he developed hearing loss due to factors of his federal employment, including working on a boat. He indicated that he first became aware of his condition and its relationship to his federal employment on September 4, 2019. Appellant did not stop work.

In support of his claim, appellant submitted a September 18, 2019 report from Dr. Melissa Cheng, a Board-certified specialist in occupational medicine. Dr. Cheng reviewed a September 4, 2019 audiogram and found that appellant had abnormal hearing.

In an undated response to a hearing loss questionnaire, appellant noted that he worked as a dock employee at a retail store from April 10, 2000 to October 27, 2005, and was exposed to noise when loading boxes off a trailer. He indicated that he worked at the Transportation Security Administration from October 31, 2005 to August 2007 and was exposed to noise when luggage was placed on conveyor belts for screening. Appellant further stated that he worked as a border patrol agent trainee at the employing establishment's U.S. Border Patrol Agent Academy from August 20 to December 19, 2007 and was exposed to noise when firing weapons three to four times per week. He noted that he used employer-provided earmuffs while firing weapons at the academy. Appellant finally indicated that he worked as a border patrol agent at the employing establishment's U.S. Border Patrol Agent Brownsville Station from December 2007 to the present and was exposed to noise while firing weapons on a quarterly basis to meet qualifying standards. He also noted that, in 2010, he joined the Riverine program and was exposed to loud noises on a daily basis. Appellant reported that he drove boats for eight years, working 40 plus hours per week, and was exposed to loud diesel inboard engine noises. He indicated that he did not have a history of any previous ear or hearing problems. Appellant noted that he did not engage in any hobbies which involved exposure to loud noises. He asserted that the constant exposure to loud noises while working as a border patrol agent caused his gradual hearing loss.

On October 31, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Gregory Rowin, an otolaryngologist, for a second opinion evaluation.

In a report dated November 26, 2019, Dr. Rowin reviewed appellant's medical record and the SOAF, performed a physical examination, and completed OWCP's evaluation questionnaire. He indicated that there was no significant variation from the SOAF. Dr. Rowin diagnosed mild sensorineural hearing loss in both ears and tinnitus and opined that they were due to noise exposure related to appellant's federal employment. He reviewed an audiogram conducted by an audiologist on that same date, which demonstrated losses of 25, 20, 15, and 20 decibels (dBs) on the right and 20, 15, 15, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 Hertz (Hz), respectively. Utilizing the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*),<sup>3</sup> Dr. Rowin calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. He completed a tinnitus

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<sup>3</sup> A.M.A., *Guides* (6<sup>th</sup> ed. 2009).

handicap inventory (THI) and rated appellant's tinnitus at three percent permanent impairment to arrive at a total binaural hearing impairment of three percent.

By decision dated January 8, 2020, OWCP accepted appellant's claim for binaural sensorineural hearing loss.

On January 24, 2020 appellant filed a claim for a schedule award (Form CA-7).

On January 30, 2020 OWCP referred appellant's medical records and SOAF to Dr. Jeffrey M. Israel, a Board-certified otolaryngologist serving as a district medical adviser (DMA), for calculation of appellant's percentage of permanent hearing impairment and assignment of the date of maximum medical improvement (MMI).

In a January 31, 2020 report, Dr. Israel noted that he reviewed the medical record and SOAF, including Dr. Rowin's November 26, 2019 report. He reviewed appellant's November 26, 2019 audiogram and concurred with Dr. Rowin's assessment of zero percent monaural loss in each ear. Dr. Israel noted that the November 26, 2019 THI, yielded a score of 42, which corresponded to three percent tinnitus impairment. However, he opined that, under the sixth edition of the A.M.A., *Guides*, a tinnitus award could not be given when there was zero percent binaural hearing impairment. As such, Dr. Israel found that the total binaural loss was zero percent. He recommended yearly audiograms, use of noise protection, and authorization for hearing aids. Dr. Israel determined that appellant had reached MMI on November 26, 2019, the date of the most recent audiogram and Dr. Rowin's examination.

By decision dated March 4, 2020, OWCP denied appellant's schedule award claim, finding that his hearing loss was not sufficiently severe to demonstrate ratable impairment, and he was, therefore, not entitled to schedule award compensation.

### **LEGAL PRECEDENT**

The schedule award provisions of FECA<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>6</sup> As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.<sup>7</sup>

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404(a); *see also Jacqueline S. Harris*, 54 ECAB 139 (2002).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

A claimant seeking compensation under FECA has the burden of proof to establish the essential elements of his or her claim.<sup>8</sup> With respect to a schedule award, it is the claimant's burden of proof to establish permanent impairment of a scheduled member or function of the body as a result of his or her employment injury.<sup>9</sup>

OWCP evaluates industrial hearing loss in accordance with the standards contained in the A.M.A., *Guides*.<sup>10</sup> Using the frequencies of 500, 1,000, 2,000, and 3,000 Hz, the losses at each frequency are added up and averaged. Then, the fence of 25 dBs is deducted because, as the A.M.A., *Guides* point out, losses below 25 dBs result in no impairment in the ability to hear everyday speech under everyday conditions. The remaining amount is multiplied by a factor of 1.5 to arrive at the percentage of monaural hearing loss. The binaural loss is determined by calculating the loss in each ear using the formula for monaural loss; the lesser loss is multiplied by five, then added to the greater loss, and the total is divided by six to arrive at the amount of binaural hearing loss.<sup>11</sup> The Board has concurred in OWCP's adoption of this standard for evaluating hearing loss.<sup>12</sup>

Regarding tinnitus, the A.M.A., *Guides* provides that tinnitus is not a disease, but rather a symptom that may be the result of disease or injury.<sup>13</sup> If tinnitus interferes with activities of daily living, including sleep, reading, and other tasks requiring concentration, up to five percent may be added to a measurable binaural hearing impairment.<sup>14</sup>

### ANALYSIS

The Board finds that appellant has not met his burden of proof to establish a ratable hearing loss for schedule award purposes.

OWCP referred appellant to Dr. Rowin for a second opinion examination to evaluate his hearing loss. In his November 26, 2019 report, Dr. Rowin diagnosed mild sensorineural hearing loss in both ears and tinnitus due to noise exposure related to appellant's federal employment. He calculated that appellant had a monaural loss of zero percent in each ear for a binaural loss of zero percent. Dr. Rowin then rated appellant's tinnitus at three percent permanent impairment to arrive at a total binaural hearing impairment of three percent.

In a January 31, 2020 report, Dr. Israel, serving as a DMA, reviewed Dr. Rowin's report and determined that appellant had zero percent monaural hearing loss in each ear. He noted that

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<sup>8</sup> *D.H.*, Docket No. 20-0198 (issued July 9, 2020); *John W. Montoya*, 54 ECAB 306 (2003).

<sup>9</sup> *R.R.*, Docket No. 19-0750 (issued November 15, 2019); *Edward Spohr*, 54 ECAB 806, 810 (2003); *Tammy L. Meehan*, 53 ECAB 229 (2001).

<sup>10</sup> A.M.A., *Guides* 250.

<sup>11</sup> *Id.*

<sup>12</sup> *G.T.*, Docket No. 19-1705 (issued April 16, 2020); *E.S.*, 59 ECAB 249 (2007); *Reynaldo R. Lichtenberger*, 52 ECAB 462 (2001).

<sup>13</sup> See A.M.A., *Guides* 249.

<sup>14</sup> *Id.*

November 26, 2019 testing revealed losses of 25, 20, 15, and 20 dBs on the right and 20, 15, 15, and 25 dBs on the left at 500, 1,000, 2,000, and 3,000 Hz, respectively. Dr. Israel totaled the dB losses to 80 on the right and 75 on the left. These values, when divided by four, resulted in an average hearing loss of 20 on the right and 18.75 on the left, which when reduced by the 25 dB fence, were reduced to zero. When multiplied by 1.5, the resulting monaural hearing loss in each ear was zero percent.

The Board finds that the DMA properly concluded that appellant did not have ratable permanent impairment of his hearing warranting a schedule award. Although appellant has an employment-related hearing loss, it is not significant enough to be ratable for schedule award purposes.<sup>15</sup>

While Dr. Rowin added a three percent impairment rating based on appellant's tinnitus, the DMA correctly explained that tinnitus may not be added to an impairment rating for hearing loss under the sixth edition of the A.M.A., *Guides* unless such hearing loss is ratable.<sup>16</sup> Accordingly, as appellant does not have ratable hearing loss, the Board finds that he is not entitled to a schedule award for the established tinnitus.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish ratable hearing loss for schedule award purposes.

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<sup>15</sup> *K.P.*, Docket No. 20-0349 (issued July 1, 2020); *G.T.*, *supra* note 12.

<sup>16</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 4, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 7, 2020  
Washington, DC

Christopher J. Godfrey, Deputy Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board